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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN MARQUEZ, Defendant and Appellant.	D075139 (Super. Ct. No. SWF1301249)

APPEAL from a judgment of the Superior Court of Riverside County, Ronald L. Taylor, Judge. (Retired Judge of the Riverside Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting, Warren Williams and Matthew Mulford, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Jonathan Marquez stole a vehicle and then drove to two separate residences where he stabbed three individuals. A jury convicted Marquez of one count of premeditated attempted murder (Pen. Code,[1] §§ 664, 187, subd. (a); count 1 [victim C.G.]), one count of attempted murder without a finding of premeditation (§§ 664, 187, subd. (a); count 3 [victim J.M.]), three counts of assault with a deadly weapon (§ 245, subd. (a)(1); counts 4–6 [victims C.G., C.B., and J.M.]), one count of first degree burglary of an inhabited dwelling (§ 459; count 7), one count of unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a); count 8), and one count of receiving a stolen vehicle (§ 496d, subd. (a); count 9). The jury found true allegations Marquez used a knife as a deadly weapon in connection with the attempted murder counts (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23); counts 1, 3), personally inflicted great bodily injury in connection with the counts for attempted murder and assault with a deadly weapon (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8); counts 1, 3–6), and committed the burglary when a person other than an accomplice was present in the residence (§ 667.5, subd. (c)(21); count 7).[2]

In separate proceedings, Marquez admitted two prior convictions and the court found true allegations Marquez had a strike prior and a prison prior. The court sentenced

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1 Further statutory references are to the Penal Code unless otherwise stated.

2 The jury acquitted Marquez of one count of attempted murder (§§ 664, 187, subd. (a); count 2 [victim C.B.]) and made no finding as to whether the count 3 attempted murder was premeditated.

Marquez to a determinate term of 30 years in prison for counts 3 through 8 plus a consecutive indeterminate term of 18 years to life for count 1.

Marquez challenges his conviction for count 5, contending the court failed to instruct the jury with a pinpoint instruction regarding accident and his attorney was ineffective by failing to request such instruction. We conclude the court was not obligated to instruct the jury regarding accident absent a request. We further conclude defense counsel was not ineffective because an accident instruction would not negate the general intent element of the crime of assault with a deadly weapon and such an instruction was inconsistent with Marquez's defense theory that someone else committed the crimes.

In supplemental briefing, Marquez contends the fines and fees imposed by the court should be stayed because the court did not make a finding of Marquez's ability to pay. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1160, 1169–1173 (*Dueñas*).) We conclude Marquez forfeited a challenge to the fines and fees imposed by the court by failing to object at sentencing.

BACKGROUND

A

On the evening of May 8, 2013, an individual visiting the home of C.B. and C.G. refused to leave. After C.B. told the man he had to leave, the man went around the back of the house, stared through a window, and banged on the back door.

C.B.'s son (Son) heard arguing and heard C.G. tell the individual he was not allowed there. The individual kept coming back and knocking at the doors as C.G. told him to leave. Son called the police.

B

1

The following morning, May 9, 2013, a woman left her car running while she went to lock the door to her house. When she returned, the car was gone. She reported her Pontiac car with a spoiler on the back was stolen.

2

Shortly thereafter, Son was outside checking the mail when a white car with a spoiler pulled into the driveway. Son saw a bottle of tequila on the passenger seat. The driver, who was Hispanic and had short hair and a goatee, got out of the car and aggressively asked for C.B. and C.G. Son told him they were out. The man said he thought Son was lying and kicked the door to the house open.

Son recognized the man's voice as the same man C.G. asked to leave the night before. Son thought the man had a weapon in his pants and saw him holding something with a black handle in the waist area. After the man kicked the door open, son heard C.B.

and C.G. screaming. Son ran down the street and called 911. Son reported someone kicked open the door to their residence. He stated his mother and her boyfriend were inside and he heard screaming. Son asked for immediate assistance. Son described the man as a bald Mexican guy with a mustache and a beard. Son said the man left in a white car with a spoiler.

C.B. awoke when the bedroom door was kicked open. She saw a man enter the room with a butcher knife. The man stabbed C.G. four times before C.G. could get out of bed. C.B. got up and stood in the corner of the room.

C.B. saw the man stab C.G. more than 20 times. When it looked like the man was going to stab C.G. in the heart, C.B. jumped up, screamed, and lunged forward. The man then came toward C.B. and stabbed her in the chest, collar bone, and arm. The man swung at C.B. four times and struck her three times.

C.B. called 911 and reported a Mexican man stabbed her boyfriend many times and the man also stabbed her in the chest. She denied knowing the man. A responding officer found C.B. on the bed with a stab wound to her chest. C.G. was on the floor with multiple stab wounds, including on his back.

C.G. sustained stab wounds on his back, shoulder, arm, and thigh. He also suffered a collapsed lung. C.B. sustained a stab wound to her chest.

In a separate incident, J.M. and his girlfriend (Girlfriend) were walking in the alley when J.M. told Girlfriend to stay where she was as he walked further up the alley. A white car drove quickly into the alley and stopped next to J.M. Girlfriend recognized the

man driving the car as a bald Mexican man who had come to the house earlier for J.M. The driver got out and talked to J.M. The driver appeared mad. Suddenly, the driver got close to J.M. and they appeared to hug. When he stepped back, Girlfriend saw the driver pulling a knife out of J.M. Girlfriend said the driver used the knife on J.M. more than once. She saw J.M. bleeding a lot from his side.

When J.M.'s brother, who was in a house nearby, heard J.M. had been stabbed, he ran through the garage and grabbed a handle from a jack stand. He saw J.M. bleeding profusely. Bystanders pointed to a white Pontiac with a spoiler backing out of the alley and yelled the person who stabbed J.M. was in the car. J.M.'s brother chased the car and threw the jack stand handle through the windshield.

J.M. was stabbed twice in the chest, once in the abdomen, and on his elbow. He suffered a collapsed lung and a large laceration of his liver. He required surgery, blood transfusions, and several liters of fluid to keep him alive.

C

The Pontiac car was equipped with a stolen vehicle recovery system and was eventually located in another county. It was parked and unoccupied when police officers first located it. As an officer observed the car, Marquez entered the driver's door of the vehicle. The officer followed the car and eventually detained Marquez when he stopped at a gas station. When Marquez got out of the vehicle, he asked if this was about the stabbings. He admitted he had "an argument with some dude and fought him" and said he then got down with "some fool … and stabbed him."

The car had damage to the front windshield. Officers found a paper bag containing alcohol, a black purse, a jack handle, a hat, and a knife on the passenger seat. None of those items were in the car when it was stolen.

D

C.B. identified Marquez as the suspect in a photo line-up when she was in the hospital. She said he was the same man who was at the house the night before. C.B. also identified Marquez in court.

C.B. denied telling the police the person who broke the door down and stabbed C.G. was named Spy. According to an officer, however, C.B. said she thought the person who had been at her home the night before and the individual who did the stabbing used the moniker Spy.

Girlfriend pointed to a picture of Marquez in a photographic line-up and said he thought he looked like the perpetrator, but she was not sure.

E

In an interview at the police station, Marquez admitted he stabbed C.G. He denied stabbing C.B. He said he warned her to get away before he stabbed her too. He said, "she tried to get in the mix." He admitted he pushed her away while he held the knife. He said if she got cut, it was accidental.

F

Marquez testified in his own defense and denied he committed any of the stabbings. Marquez said his cousin, Spy, came to town because C.G. and J.M. were selling drugs for Spy and they owed Spy money. Marquez went with Spy and Spy's

friend to C.G.'s house on May 8, 2013. Marquez said Spy went inside for 15 to 20 minutes. When Spy returned, he said C.G. and C.G.'s girl were high and did not have the money, but they agreed to pay the following day.

Marquez said he and Spy's friend dropped Spy off at J.M.'s house the next day to pick up money J.M. owed. Spy and J.M. argued about money and issues related to drug sales.

After Spy returned, Marquez said they formed a plan to scare C.G., but Marquez denied he agreed to stab anyone. Marquez, Spy, and Spy's friend got into a car, but Spy's friend decided he did not want anything to do with the plan. Marquez said they were all high. When Marquez saw a lady turn on her car and walk back to her apartment, Marquez suggested they steal the car. Spy jumped in the driver's seat and Marquez got in the car with him.

After going to a liquor store, Marquez said they went to C.G.'s residence and Spy went inside alone. When Spy returned, he drove back to J.M.'s house. Spy parked in the alley, got out of the car, and went to talk to J.M. Spy appeared to punch J.M. As they drove away, someone threw a big jack at the car, shattering the glass. Marquez said he asked Spy what happened, but Spy just drove to another county.

Spy eventually told Marquez he had stabbed C.G. and J.M. Marquez claimed Spy threatened to have Marquez's mom and sister killed if Marquez said anything. Spy told Marquez to go back to the car and get rid of it. He also told Marquez to take the rap for the crimes. When Marquez was stopped by the police, he mentioned the stabbings

because Spy had told him to take the rap. He said he confessed to stabbing C.G. for the same reasons.

DISCUSSION

I

Marquez contends the court violated his due process rights under the state and federal Constitutions because the court did not instruct the jury sua sponte regarding accident and his counsel was ineffective in failing to request a pinpoint instruction. He contends his conviction for count 5, assault of C.B. with a deadly weapon, should be reversed. We disagree.

Section 26 states all persons are capable of committing crimes except for certain classes of persons, including "[p]ersons who committed the act … through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." CALCRIM No. 3404 provides the following instruction for general or specific intent crimes: "[The defendant is not guilty of <*insert crime[s]*> if (he/she) acted [or failed to act] without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of <*insert crime[s]*> unless you are convinced beyond a reasonable doubt that (he/she) acted with the required intent.]"

The California Supreme Court has held that accident is not an affirmative defense, but is "a request for an instruction that negates the intent element." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 199, fn. 3.) If the trial court has provided complete and accurate instructions regarding the elements of a crime, including the requisite mental element, and the theory of accident simply negates the mental element of the offense, the court is

only obligated to provide a further pinpoint instruction upon request by the defense. (*People v. Anderson* (2011) 51 Cal.4th 989, 996 (*Anderson*); *People v. Jennings* (2010) 50 Cal.4th 616, 674 (*Jennings*) [claiming a crime was committed through accident " 'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime' "].)

Marquez acknowledges we are bound by these precedents (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), but invites us to disagree with them to preserve the issue for future review. We decline to do so.

Generally, a court's sua sponte duty to instruct " 'on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case' " extends to instructions regarding defenses the defendant is relying on or other defenses "if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*Anderson, supra,* 51 Cal.4th at p. 996, internal quotations omitted.) The court does not need to give a pinpoint instruction if there is no substantial evidence to support the defense or theory. (*Jennings, supra,* 50 Cal.4th at p. 675; *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120.)

Marquez did not request, and the court was not obligated to give, a pinpoint instruction regarding accident with respect to the assault with a deadly weapon charge. "[A]ssault with a deadly weapon is a general intent crime; the required mens rea is 'an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.' " (*People v. Perez* (2018) 4 Cal.5th 1055, 1066.) The trial court properly

instructed the jury on the elements of assault with a deadly weapon, including the elements that "defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person" and "did that act willfully." (CALCRIM No. 875.)

Viewing the evidence in the light most favorable to Marquez, an accident instruction would not have negated the general intent element of the crime of assault with a deadly weapon. Although Marquez said he did not intend to stab or hurt C.B., he admitted he told C.B. to back off or he would stab her. Marquez also admitted he pushed C.B. away while he held the knife in his hand when C.B. tried to intervene in the stabbing of C.G. Marquez did not say the application of force by way of a push was an accident, only that it was an accident if she was cut. Marquez does not suggest a reasonable person would not realize a cut would directly, naturally, and probably result from pushing someone while holding a knife. (*People v. Williams* (2001) 26 Cal.4th 779, 788.) Therefore, the court was not obligated to instruct on the theory of accident and there was sufficient evidence to support the jury's conviction for assault with a deadly weapon against C.B.[3]

Additionally, the theory of accident was directly inconsistent with the defense Marquez advanced in his trial testimony, which was that Marquez's cousin, Spy,

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3 Despite the lack of a pinpoint instruction, the jury may have credited Marquez's statement that he did not intend to stab C.B. by acquitting him of the charge of attempted murder of C.B. (count 2) because accident would have negated the intent-to-kill element for attempted murder. (CALCRIM No. 600.)

committed the offenses and threatened to harm Marquez's family if he did not take the "rap" for Spy.

For these same reasons Marquez's counsel was not ineffective in not asking for an instruction on the theory of accident. To establish ineffective assistance of counsel, a defendant has the burden to show counsel's performance fell below the standard of reasonableness under prevailing professional norms and the attorney's deficient performance was prejudicial, i.e., the defendant would have obtained a more favorable result absent the alleged error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 215–217.) In our review of ineffective assistance of counsel claims, our scrutiny of counsel's performance " 'must be highly deferential' " and a defendant "must overcome the 'presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." ' " (*Bell v. Cone* (2002) 535 U.S. 685, 698.)

Marquez did not meet this burden. Since accident did not negate the general intent element of the crime of assault with a deadly weapon and Marquez admitted he willfully pushed C.B. away with a hand holding a knife, it is reasonable to infer counsel did not want to call attention to this fact. " '[I]f the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.' " (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) Marquez cannot establish he would have obtained a more favorable result if the court had provided a pinpoint instruction on accident.

Finally, Marquez's citation in his reply brief to the case of *McCoy v. Louisiana* (2018) 548 U.S. ___ [138 S.Ct. 1500, 1505; 200 L.Ed.2d 821], which held a defendant has a right to decide on the objective of his defense even if contrary to the advice of counsel's experience-based advice, does not assist Marquez. Marquez, with the assistance of counsel, presented exactly the defense he desired at trial by testifying he was innocent and his cousin committed the crimes. Marquez testified he lied to protect his cousin when he admitted in the police interview that he stabbed C.G. and pushed C.B. The fact the jury did not believe this defense does not give rise to an ineffective assistance claim on the issue of jury instructions.

II

Marquez, relying on *Dueñas*, *supra*, 30 Cal.App.5th 1157, contends the court's imposition of fines and fees without a determination of ability to pay violated his due process rights under the state and federal Constitutions. (*Id*. at p. 1168.) We conclude Marquez forfeited a claim of error concerning the trial court's failure to determine his ability to pay the assessments and fines. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1154 (*Frandsen*).)

At the sentencing hearing the trial court imposed a restitution fine of $2,400 pursuant to section 1202.4, subdivision (b), plus the same amount as a parole revocation fine pursuant to section 1202.45, which was suspended unless parole is revoked. The court imposed $320 for court security fees pursuant to section 1465.8 and a criminal conviction assessment of $240 pursuant to Government Code section 70373. Marquez did not object to the imposition of the fines or fees.

Dueñas, supra, 30 Cal.App.5th 1157 involved an indigent and homeless mother of young children who lacked a high school education or a job due to disability. (*Id.* at pp. 1160–1161.) After Dueñas pleaded no contest to misdemeanor driving with a suspended license, the court imposed, over Dueñas's objection, court facilities and court operations assessments as well as a minimum restitution fine of $150 under section 1202.4, subdivision (c), which the court concluded were mandatory despite inability to pay. (*Dueñas,* at pp. 1161–1163.) The appellate court reversed the assessments concluding "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments." (*Id*. at p. 1164; see *id*. at pp. 1172–1173.) The court remanded the matter to the trial court concluding although "section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Id*. at p. 164)

In *Frandsen, supra,* 33 Cal.App.5th 1126 the court noted section 1202.4, subdivisions (c) and (d) allow a trial court to consider inability to pay when the court considers imposing a restitution fine more than the statutory minimum fine. (*Id.* at pp. 1153–1154.) "Given that the defendant is in the best position to know whether he has the ability to pay, it is incumbent on him to object to the fine and demonstrate why it should not be imposed." (*Id*. at p. 1154.) The *Frandsen* court similarly rejected an argument that objections to the assessments imposed under section 1465.8 and

Government Code section 70373 would have been futile noting nothing precluded the defendant from making a record, as Dueñas did, about the ability to pay. "*Dueñas* was foreseeable. Dueñas herself foresaw it." (*Frandsen*, at p. 1154.)

This court recently followed *Frandsen* and found a defendant forfeited an ability-to-pay argument regarding a restitution fine in excess of the statutory minimum as well as the imposition of assessment fees by failing to object at the time of sentencing. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1032–1033 (*Gutierrez*).)

We acknowledge some courts have reached a different conclusion about the foreseeability of *Dueñas*. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [court declined to find forfeiture because *Dueñas* was "a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial"]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 (*Johnson*) ["we are hard pressed to say [*Dueñas*'s] holding was predictable and should have been anticipated"].)

However, we need not address "any perceived disagreement on the forfeiture issue between *Frandsen* on one hand and *Castellano* and *Johnson* on the other" because *Castellano* and *Johnson* involved imposition of statutory minimum restitution fines. (*Gutierrez, supra,* 35 Cal.App.5th at p. 1132.) Even in *Johnson*, the court did not categorically reject the notion of forfeiture for restitution fines above the statutory minimum noting the "distinction between minimum and above minimum restitution fines

has consequences for the applicability of forfeiture doctrine." (*Johnson, supra,* 35 Cal.App.5th at p. 138, fn. 5.)[4]

Here, the court's restitution fine of $2,400 under section 1202.4, subdivision (b) exceeded the statutory minimum restitution fine of $300 per case. (*People v. Soria* (2010) 48 Cal.4th 58, 64–65; *People v. Sencion* (2012) 211 Cal.App.4th 480, 483.) As in *Frandsen* and *Gutierrez,* Marquez had the opportunity and incentive to object for lack of ability to pay at the time of sentencing and he did not do so. Additionally, nothing in the record suggests Marquez is unable to perform prison work and we may imply his lengthy prison sentence offers the ability to earn prison wages. (*Johnson, supra,* 35 Cal.App.5th at pp. 139–140; see *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1836–1837.) Under these circumstances, we conclude he forfeited his claim as to both fines and fees.

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4 The *Johnson* court affirmed the judgment concluding that even if it was error to impose fees without an ability to pay hearing, the error was harmless because, unlike in *Dueñas*, there was evidence in the record Johnson had some financial means and past income-earning capacity as well an ability to earn prison wages over a sustained period. (*Johnson, supra,* 35 Cal.App.5th at pp. 139–140.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

AARON, J.

DATO, J.